IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. [redacted]

DISTRICT OF COLUMBIA, *Petitioner*,

v.

FRANCES C. LEWIS (formerly Frances Carter Frick) Executrix of the Estate of Harold C. Frick, deceased, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

SUBJECT INDEX

	PAGE
Opinions below	2
Grounds on Which the Jurisdiction of This Court is Invoked	2
Statement of Question Presented	3
District of Columbia Statutes Involved	3
Statement of the Case	5
Reasons for Granting Writ	8
Conclusion	13
Appendix	
Opinion of the Court	1A
Judgment of the Court	14A

CASES CITED

Adriance v. *Higgins*, 113 F 2d 1013 13

Commissioner of Internal Revenue v. *Marosi*, 156 F. 2d 929 9, 10

Del Vecchio v. *Bowers*, 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190 8

District of Columbia v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406 8

Florida National Bank and Trust Company at Miami v. *United States*, 182 F. Supp. 76 13

Harris v. *Commissioner of Internal Revenue*, 340 U. S. 106, 95 L. Ed. 111, 71 S. Ct. 181 10, 11

Helvering v. *United States Trust Co.*, 111 F. 2d 576, cert. denied 311 U. S. 678 13

Merrill v. *Fahs*, 324 U. S. 308, 89 L. Ed. 963, 65 S. Ct. 655 11

Meyer's Estate v. *Commissioner*, 110 F. 2d 367, cert. denied 310 U. S. 651 12

STATUTES CITED

Act of August 17, 1937, 50 Stat. 683, ch. 690, as amended by Title V of the Act of July 26, 1939, 53 Stat. 1111:

Section 1(a), Title V, Article I 4

Section 1(c), Title V, Article I 5

Section 1(d), Title V, Article I 5

District of Columbia Revenue Act of 1937, Sections 3 and 4 of Title IX, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, and as amended by Section 5(b) of the Act of July 26, 1939, 53 Stat. 1108, and by Sections 3(a) and (3)b of the Act of July 10, 1952, 66 Stat. 543, ch. 649:

Section 3 7

Section 4 3, 7

District of Columbia Code, 1951:
Section 47-1601(a) 4
Section 47-1601(c) 5
Section 47-1601(d) 7
District of Columbia Code, 1951, Supp. VIII:
Section 47-2403 7
Section 47-2404 ..... 3, 7

MISCELLANEOUS CITATIONS

United States Code:
Title 28, Part IV, Section 1254(1) 3
88 Washington Law Reporter 486 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The District of Columbia, a municipal corporation, through its attorneys, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The majority of the Division of that Court to which this case was assigned concluded that an obligation arising under a separation agreement relinquishing marital rights, which agreement was not incorporated in the decree of divorce between the parties, was made "for full consideration in money or money's worth" and was, therefore, not taxable under the District of Columbia inheritance tax statute.

Mr. Justice Burton, retired, in his dissent stated in essence that decisions of the Supreme Court of the United States directed to substantially identical provisions of Federal tax statutes were determinative of the question posed under the District tax statute; that the decision of the majority was contrary to these decisions, and that the contentions of the District which had been rejected by the majority were correct.

OPINIONS BELOW

The official opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported as yet in either the official reports of that court or in the Federal reporter. The opinion is included herein on page 1A, *infra*, of Appendix A to this petition.

The opinion of the District of Columbia Tax Court does not appear in any official report, but is contained in 88 Washington Law Reporter 486, an unofficial reporter containing opinions of the courts of the District of Columbia. The opinion of the District of Columbia Tax Court, and its decision, from which an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, are included in the Joint Appendix printed in accordance with the rules of the United States Court of Appeals for the District of Columbia Circuit and filed with this petition.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 19, 1961, and is included herein on page 14A, *infra*, of Appendix A to this petition. A petition filed with the Court for a rehearing en banc was denied on February 21, 1961.

It is believed that this Court is vested with jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit by writ of certi-

orari under the provisions of Title 28, Part IV, Section 1254(1), United States Code, as amended, and Section 4, Title IX, District of Columbia Revenue Act of 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, and as amended by Section 3 (b) of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Section 47-2404, D. C. Code, 1951, Supp. VIII).

STATEMENT OF QUESTION PRESENTED

The District of Columbia inheritance tax statute imposes an inheritance tax upon the transfer of property having its taxable situs in the District and transferred from a deceased "either by will or by law, or by right of survivorship," as well as "by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth)." Respondent, as the executrix of the estate of Harold C. Frick, made a payment out of the assets of the estate of the deceased to Vida M. Frick, the former wife of the deceased, based upon a provision of a separation agreement entered into between Vida and the deceased, which provision was not incorporated in or made a part of a Missouri decree of final divorce nullifying the marriage of the deceased and Vida. Under these circumstances, the question presented is:

Was not the transfer made by respondent to the former wife of the deceased under a provision of a separation agreement between them a taxable transfer under the District of Columbia inheritance tax statute?

DISTRICT OF COLUMBIA STATUTES INVOLVED

Title V, Article I, Section 1(a), Section 1(c), and Section 1(d) of the Act of August 17, 1937, 50 Stat. 683, ch. 690, as amended by Title V of the Act of July 26, 1939, 53 Stat. 1111 (Section 47-1601(a), (c), (d), D. C. Code, 1951), provides:

"TITLE V—INHERITANCE AND ESTATE TAXES"

Taxes shall be imposed in relation to estates of decedents, the shares of beneficiaries of such estates, and gifts as hereinafter provided:

"ARTICLE I—INHERITANCE TAX

Sec. 1 (a) All real property and tangible and intangible personal property, or any interest therein, having its taxable situs in the District of Columbia, transferred from any person who may die seized or possessed thereof, either by will or by law, or by right of survivorship, and all such property, or interest therein, transferred by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth), made or intended to take effect in possession or enjoyment after the death of the decedent, or made in contemplation of death, to or for the use of, in trust or otherwise (including property of which the decedent has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from such property or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom), to the father, mother, husband, wife, children by blood or legally adopted children, or any other lineal descendants or lineal ancestors of the decedent, shall be subject to a tax as follows: 1 per centum of so much of said property as is in excess of $5,000 and not in excess of $50,000; 2 per centum of so much of said property as is in excess of $50,000 and not in excess of $100,000; 3 per centum of so much of said property as is in excess of $100,000 and not in excess of $500,000; 4 per centum of so much of said property as is in excess of $500,000 and not in excess of $1,000,000; 5 per centum of so much of said property as is in excess of $1,000,000.

• • •

"(c) So much of said property so transferred to any person other than those included in paragraphs (a) and (b) of this section and all firms, institutions, associations, and corporations shall be subject to a tax as follows: 5 per centum of so much of said property as is in excess of $1,000 and not in excess of $25,000; 7 per centum of so much of said property as is in excess of $25,000 and not in excess of $50,000; 9 per centum of so much of said property as is in excess of $50,000 and not in excess of $100,000; 12 per centum of so much of said property as is in excess of $100,000 and not in excess of $500,000; 15 per centum of so much of said property as is in excess of $500,000.

"(d) Executrix, administrators, trustees, and other persons making distribution shall only be discharged from liability for the amount of such tax, with the payment of which they are charged, by paying the same as hereinafter described."

STATEMENT OF THE CASE

On December 22, 1934, Harold C. Frick and Vida M. Frick were absolutely divorced by decree of the Circuit Court of Jackson County, Missouri, located in Kansas City, Missouri, where the parties had resided since their marriage. On the date of the divorce, and immediately prior to the entry of the divorce decree, the parties entered into a separation agreement, among the terms of which was the following:

"(3) If the first party [Harold C. Frick] should at any time hereafter depart this life, in lieu of all payments hereunder due from the date of his death and necessarily to be paid from his estate, a lump sum shall be paid to second party as follows:

• • •

"(d) If he should die between the years 1952 and 1958, the sum of Twenty-five Thousand Dollars ($25,000)."

The decree of divorce entered by the Missouri Court *did not* incorporate the provisions of the separation agreement.

Harold Frick subsequently moved to the District of Columbia and married Frances Carter, the present executrix of his estate. Harold Frick died on July 12, 1956 at which time he was domiciled in the District of Columbia.

On September 7, 1957, Harold's former wife, Vida Frick, brought suit in the United States District Court for the District of Columbia for the sum of $25,000 which she claimed to be due and owing to her under the provision of the *separation agreement* providing for a lump sum payment to her in the event of Harold's death between the years 1952 and 1958. On November 14, 1957, the executrix of Harold's estate, Frances Carter Frick, paid Vida, in full settlement of her claim under the separation agreement, the sum of $23,500. On November 14, 1957, the suit was dismissed by Vida as "Settled, Satisfied and Dismissed with Prejudice."

On June 3, 1958, the assessing authority of the District of Columbia assessed an inheritance tax of $1,125 against Vida based upon the payment made to her under the separation agreement. The assessment of inheritance tax not having been paid by Vida or the executrix of Harold's estate, the Finance Officer of the District of Columbia proceeded by distraint to secure payment from the executrix of the amount of taxes and interest which form the subject matter of this case. On March 26, 1959, Frances Carter Frick, individually and as executrix of the estate of Harold C. Frick, filed with the Finance Office of the District of Columbia a claim for refund of the aforementioned taxes. The time for action on the claim for refund having expired, Frances C. Lewis (formerly Frances Carter Frick) executrix of the estate of Harold C. Frick, deceased, filed on November 2, 1959, a petition in the District of Columbia Tax Court seeking a refund of the inheritance taxes, to-

gether with interest. That court had jurisdiction over respondent's appeal under the provisions of Section 3 of Title IX of the Act of August 17, 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, and as amended by Section 5 (b) of the Act of July 26, 1939, 53 Stat. 1108, and by Section 3 (a) of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Section 47-2403, D. C. Code, 1951, Supp. VIII). Following a decision of the District of Columbia Tax Court reversing the action of the Finance Officer in denying respondent's claim for refund of inheritance taxes on the ground that respondent was not liable under the District of Columbia inheritance tax statute, the District of Columbia appealed to the United States Court of Appeals for the District of Columbia Circuit. The latter court had jurisdiction over the appeal pursuant to the provisions of Section 4, Title IX, District of Columbia Revenue Act of 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 and as amended by Section 3(b) of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Section 47-2404, D. C. Code, 1951, Supp. VIII). On January 19, 1961, the Court of Appeals, through a three-judge Division, rendered a decision in which the majority of the Division concluded that a transfer in lieu of a husband's obligation to support his wife during their joint lives or until her remarriage is made "for full and adequate consideration in money or money's worth" within the meaning of the District of Columbia inheritance tax statute. Mr. Justice Burton, to the contrary, stated in his dissenting opinion that decisions of this Court upon substantially identical provisions of Federal tax statutes are determinative of the question posed in this case, and that these decisions require the conclusion that the transfer of personal property by the deceased to his divorced wife is a taxable transfer not made for full consideration in money or money's worth.

Following the decision of the majority of the Division, the District petitioned the Court of Appeals for a rehearing en banc pursuant to Rule 26 of the General Rules of that court. By order dated February 21, 1961, the court denied the District's petition.

REASONS FOR GRANTING WRIT

The decision in this case by the United States Court of Appeals for the District of Columbia Circuit is not of that category of decisions which this Court in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190, said this Court would not ordinarily review. This case concerns an interpretation of the District of Columbia inheritance tax statute, as did *District of Columbia* v. *Pace*, 320 U.S. 698, 88 L. Ed. 408, 64 S. Ct. 406, decided by this Court January 10, 1944. This case, and the results which follow upon the decision thereof by the Court of Appeals, are matters of paramount importance to the District of Columbia and to the administration of its tax statutes.

Moreover, the petition for writ of certiorari sought by the District of Columbia presents to this Court for consideration a decision of the United States Court of Appeals for the District of Columbia Circuit which is unquestionably at variance with decisions of this Court and numerous decisions of the United States Circuit Courts of Appeal in similar matters, and which is at variance with the District of Columbia inheritance tax statute, as amended. That statute is the basis for a substantial part of the revenue raised by the District of Columbia for the carrying out of its governmental functions.

The District of Columbia inheritance tax statute provides for a tax upon property transferred out of a deceased's estate "by deed, grant, bargain, gift, or sale (*except in cases of a bona fide purchase for full consideration in money or money's worth*) * * *." (Emphasis supplied.)

As the Court of Appeals stated, the payment in question was "transferred by deed, grant, bargain, gift, or sale." The issue presented is solely whether the transfer was made for "full consideration in money or money's worth" within the meaning of the District statute. The District contends here, as it did below, that, although this phrase has not been the subject of an interpretation by any appellate court in the District of Columbia, substantially identical phrasing in federal tax statutes has been construed by this Court, as well as numerous federal circuit courts of appeal and that such construction is controlling herein.

The question in the present case was considered in 1946 by the United States Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue* v. *Marcsi*, 156 F. 2d 929. In an opinion written by Judge Learned Hand involving the Internal Revenue Code of 1939, the Court said at page 930:

> "* * * The Tax Court held that the claim was not 'founded on a promise or agreement,' but upon the decree of the divorce court, and that therefore the qualification of § 812 (b), did not apply that any allowance must be limited to what was given in consideration of 'money or money's worth' * * *."

The Court went on to hold:

> "We have three times decided that the words in the last paragraph of § 812 (b): 'other marital rights in the decedent's property,' include a wife's right to support during her husband's life. It follows that a claim based upon an agreement by which a wife relinquishes that right in consideration of sums, payable in whole or in part at or after his death, is not deductible from his gross estate. * * * That rule is too well settled to be disturbed; * * *. That question apparently first arose in 1939, and the Board of Tax Appeals held

> that, since the divorce court was free to disregard any allowances made in the separation agreement, the allowances were authentically its own, even in cases where it expressly accepted as proper the allowances actually agreed upon. * * * there are no decisions to the contrary. At first blush the distinction may seem a little formal, but on consideration it appears to be sound. One can of course say that a divorce decree is 'founded' upon the testimony of the witnesses, and in that sense the decree of the Nevada court in the case at bar was 'founded' upon the separation agreement. But it is pretty clear that that is not the sense in which § 812(b) uses the word; rather it means that the legal transaction which creates the obligation is the agreement, and in that sense the allowances are not 'founded' upon the agreement but upon the command of the court. * * *."

The *Maresi* case was cited with approval by this Court in 1950 in *Harris* v. *Commissioner of Internal Revenue*, 340 U. S. 106, 95 L. Ed. 111, 71 S. Ct. 181. In the *Harris* case the parties had entered into a separation agreement setting forth their respective rights to jointly owned property. The agreement stated that its purpose was to effect a settlement of the respective property rights, and also provided that in the event a divorce should be decreed, the final settlement agreement would be submitted to the divorce court "for its approval." This Court, pointing out that the agreement was conditioned upon the entry of a divorce decree and noting that the divorce court was free to accept the provisions of the agreement in whole or in part, said at page 110:

> "* * * The decree, not the arrangement submitted to the Court, would fix the rights and obligations of the parties. *That was the theory of Commissioner* v. *Maresi, 156 F. 2d 929, and we think it sound.*" (Emphasis supplied.)

This Court then emphasized:

> "• • • In each case it is the decree that creates the rights and duties; and a decree is not a 'promise or agreement' in any sense—popular or statutory."

This Court held that the transfers involved in the *Harris* case *were founded* upon the divorce decree and were therefore not subject to the Federal gift tax. In the present case, however, the transfer in question was based upon a provision in a separation agreement which was *not* incorporated into the divorce decree.

Mr. Justice Burton, in citing *Harris* in his dissent in the case at bar, said:

> "• • • Th marital rights given up by the wife appear to have been substantially the same in *Harris* as those given up by the wife in the instant case. The Supreme Court regarded it as settled that if the transfer had been based merely upon the separation agreement, as it was in the instant case, there would have been no transfer for adequate and full consideration and the transfer would have been subject to the gift tax. • • •."

In *Merrill* v. *Fahs*, 324 U. S. 308, 89 L. Ed. 963, 65 S. Ct. 655, decided in 1945, this Court considered a transfer which a taxpayer claimed constituted "adequate and full consideration in money or money's worth" based upon the relinquishment of her marital rights under the Federal gift tax statute containing a provision similar to provisions in the Federal estate tax and District of Columbia inheritance tax statutes. Tracing the development of this phrase since its first appearance in the Revenue Act of 1926, this Court pointed out that Congress changed the wording after the phrase "fair consideration" contained in previous acts had been given an expanded construction by the courts. This Court said at page 312:

> "• • • Congress undoubtedly intended the requirement of 'adequate and full consideration' to exclude relinquishment of dower and other marital rights with respect to the estate tax. • • •."

As Mr. Justice Burton emphasized in his dissent:

> "• • • I must conclude, therefore, that the meaning of the somewhat cryptic exemption clause now before us has been authoritatively determined by the Supreme Court. Whatever doubt might have been engendered by the omission of any express reference to the effect of the relinquishment of marital rights from the gift tax statute and from the District inheritance tax statute, that doubt has been dispelled by the decisions in the *Merrill* and *Harris* cases. See also *Taft* v. *Commissioner*, 304 U. S. 351 (1938)."

Mr. Justice Burton concludes:

> "In *Merrill* v. *Fahs*, the Supreme Court made it clear that its guiding principle in the construction of these statutes was that the federal gift and estate taxes must be uniformly construed. The Court said that 'to interpret the same phrases in the two taxes concerning the same subject matter in different ways where obvious reasons do not compel divergent treatment is to introduce another and needless complexity into this already irksome situation.' 324 U. S. at 313. The Supreme Court held that the federal estate and gift taxes were *in pari materia* and should be interpreted harmoniously lest there be a 'subversion of the legislative intent.' The need to give harmonious construction to the words in Congress' taxing statutes is no less compelling here."

Various Federal courts have ruled in conformance with the decisions of this Court regarding the taxability of transfers under the Federal estate and gift tax statutes. *Meyer's Estate* v. *Commissioner*, 110 F. 2d 367, cert. denied

310 U. S. 651; *Helvering* v. *United States Trust Co.*, 111 F. 2d 576; cert. denied, 311 U. S. 678; *Adriance* v. *Higgins*, 113 F. 2d 1013.

As late as April 1, 1960, the United States District Court for the Southern District of Florida cited *Harris* v. *Commissioner*, *supra*, as controlling, for Federal estate tax purposes, upon the subject of transfers similar to the one in the present case. In *Florida National Bank and Trust Company at Miami* v. *United States*, 182 F. Supp. 76, the District Court said:

> "While numerous other cases have been cited and text citations given, including Mertens, Law of Federal Gift & Estate Taxation, Vol. 5, page 180, ¶ 34.41 and other paragraphs, it seems clear that whatever may have been any apparent conflict in the older decisions, these conflicts were all set to rest by the United States Supreme Court decision of Harris v. Commissioner, and that that rule has been adhered to since.
>
> "There seems to be no real dispute about the federal law on this subject. • • •."

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit is contrary to and at variance with applicable decisions of this Court, as well as with applicable decisions of other Federal courts upon the same subject matter. As such, the decision results in a construction of the District of Columbia Inheritance Tax Statute inconsistent with that given by this Court to the similarly worded Federal estate and gift tax statutes. Moreover, aside from the conflict in construction, the assessment of inheritance tax upon the transfer at issue in this case was clearly correct since, in any event, the transfer was not made "for full consideration in money or money's worth."

For these reasons, the District of Columbia asks that its petition herein for a writ of certiorari be granted.

Respectfully submitted,

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